SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1111

UNITED STATES STEEL COMPANY,

Petitioner,

v.

MOSES DICKERSON, MILLARD STARLING, EDDIE WILLIAMS, INTERNATIONAL, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 4889, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 5092, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 5030, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 5116, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 2670, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 7246, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 507, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 510, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 7309, UNITED STEEL WORKERS OF AMERICA (AFL/CIO), LOCAL 7420, UNITED STEEL WORKERS OF AMERICA (AFL/CIO),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Moses Dickerson, Millard Starling, Eddie Williams, International, United Steel Workers of America (AFL/CIO), Local 4889, United Steel Workers of America (AFL/CIO), Local 5092, United Steel Workers of America (AFL/CIO), Local 5030, United Steel Workers of America (AFL/CIO), Local 5116, United Steel Workers of America (AFL/CIO), Local 2670, United Steel Workers of America (AFL/CIO), Local 7246, United Steel Workers of America (AFL/CIO), Local 507, United Steel Workers of America (AFL/CIO), Local 510, United Steel Workers of America (AFL/CIO), Local 7309, United Steel Workers of America (AFL/CIO), Local 7420, United Steel Workers of America (AFL/CIO),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

United States Steel Company, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of

the United States Court of Appeals for the Third Circuit entered in the above entitled case on January 7, 1975, dismissing U. S. Steel's Appeal from an Order of the District Court granting class action status to the Plaintiff's Title VII action alleging discrimination on account of race.

For the reasons set forth below, the Court of Appeals erred in failing to follow the opinion of this Court in *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, 171 (1974), holding that an order granting class action status is appealable as a direct appeal under 28 U. S. C. § 1291.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Third Circuit, which is not as of this date reported in the official or unofficial reports, is as follows:

> "The foregoing motion is granted. See Samuels v. University, F. 2d , 3rd Cir. No. 74-1624, December 24, 1974."

The Opinion by Newcomer, J., of the United States District Court for the Eastern District of Pennsylvania filed on September 16, 1974, is not officially reported but is unofficially reported at 7 F. E. P. Cases 1318 (1974), and reprinted in the Appendix to this brief.

JURISDICTION.

(i) The Order of the United States Circuit Court of Appeals for the Third Circuit was entered on January 7, 1975.

(ii) The Petition for Rehearing and Suggestion for Rehearing before the Court en banc therein was denied

by the United States Circuit Court of Appeals for the Third Circuit on February 7, 1975, with Van Dusen, J. voting to grant reargument.

(iii) The statutory provision conferring jurisdiction on your Honorable Supreme Court to review said judgment by Certiorari is that contained in the Act of Congress, June 25, 1948, c. 646, 62 Stat. 928, reading as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; . . . ." (28 U. S. C. A. § 1254-1).

QUESTIONS PRESENTED FOR REVIEW.

Is an Order granting class action status under F. R. C. P. 23 appealable under 28 U. S. C. § 1291, where the record establishes that:

¶ the prospects of success on the merits of appeal are strong;

¶ the question of class action is separable from, collateral to,—and on appeal will *not* prejudice or delay the individual plaintiffs' claims;

¶ if an appeal is not heard now, the defendant will incur hundreds of thousands of dollars of needless expense, which could never be recovered if it were later determined the lower court was wrong in granting class action status.

STATUTES AND RULES INVOLVED.

This question involves the correct and definitive interpretation of the Act of Congress as amended October 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348, which provides that:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." 28 U. S. C. A. § 1291.

Also involved are those portions of Rule 23 pursuant to which this action has been certified as a class action:

> "(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) *Class Action Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> • • •
>
> (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

STATEMENT OF THE CASE.

United States Steel Corporation (U. S. Steel), by its attorneys, Duane, Morris & Heckscher, has filed this Petition with this Honorable Court to review and reverse the Order of January 7, 1975 wherein the United States Court of Appeals for the Third Circuit granted plaintiffs' Motion to Quash the Appeal.

The Appeal to the Third Circuit was filed to review and reverse the Order of September 16, 1974 by Judge Newcomer, of the Eastern District of Pennsylvania, who granted plaintiffs class action status under Rule 23(b)(2) of the Federal Rules of Civil Procedure. This Order (see below, page 8) permits three former employees (who now seek back pay and belated reinstatement for alleged acts of individual discrimination against them) through their counsel to represent, inter alia, all current black employees in a broad-based attack on employment practices, seniority and virtually every facet of U. S. Steel's employment relationship with its current employees at its Fairless Hills plant, located in Bucks County, Pennsylvania.

For the reasons outlined below, the underlying questions on the appeal involve matters of great importance to U. S. Steel, as well as to the fair administration of justice, and clearly relate to a "collateral matter that could not be reviewed effectively on appeal from the final judgment." *Eisen v. Carlisle & Jacquelin,* 417 U. S. 156, 171 (1974).

A. The Parties.

Your Petitioner is a defendant in the Civil Action brought in the United States District Court for the Eastern District of Pennsylvania, *Dickerson, et al. v. United States Steel Corporation, et al.,* Civil Action No. 73-1292.

The individually named plaintiffs in this action and the prevailing parties on class action determination in the decision sought to be challenged by the appeal to the Third

Circuit Court of Appeals are three black former employees of U. S. Steel who all voluntarily left U. S. Steel's Fairless Hills plant.

(a) Moses Dickerson was employed by U. S. Steel at Fairless Hills plant from November 12, 1969 until July, 1973, when he voluntarily quit. [See affidavit of Kevin J. Goodwin ("Goodwin affidavit"), reprinted in the Appendix.]

(b) Millard Starling was employed by U. S. Steel from 1940 until his retirement in 1970. (Complaint, paragraph 5, Goodwin affidavit.)

(c) Eddie Williams was employed at the Fairless Hills plant from October, 1969 until November, 1971, when he returned to Birmingham, Alabama, without notice to U. S. Steel. (Goodwin affidavit.)

B. The Pleadings.

The Complaint alleges that this action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq. and 42 U. S. C. § 1981 on behalf of themselves and allegedly on behalf of others similarly situated. The plaintiffs below allege that the defendants below discriminated against them, for which they seek reinstatement and damages (Complaint, pp. 14-16).

In addition, plaintiffs also seek, on their own behalf and on behalf of the others they seek to represent, to challenge nearly every facet of U. S. Steel's employment relations with all its employees at its Fairless Hills plant.

U. S. Steel filed an answer denying, *inter alia*, the general, conclusory allegations of racial discrimination in the complaint, and subsequently during the initial pretrial discovery filed uncontested documentary material indicating there was no merit to the individual charges of discrimination.

C. Discovery.

Thereafter, from November 2, 1973, to March 22, 1974, the parties engaged in extensive pretrial discovery limited to developing a record for resolution of the class action issues.

On March 22, 1974, U. S. Steel filed the affidavit of Kevin J. Goodwin, Acting Labor Contract Administrator, Personnel Services Department of U. S. Steel's Fairless Hills plant, which was uncontroverted in the record below. This affidavit sets forth facts of employment concerning the named individual plaintiffs, revealing as to two, Messrs. Dickerson and Williams, their insubordination, absenteeism, and poor performance records. As to the third, Starling, the affidavit sets forth his retirement on a voluntary pension. In addition, the affidavit shows that none of the individually named plantiffs ever filed a grievance alleging that U. S. Steel acted improperly towards them.

Furthermore, the Goodwin affidavit completely and categorically denies that there is any discriminatory policy or across-the-board discriminatory practices at U. S. Steel's Fairless Hills plant. Thus, the undisputed evidence of record establishes that there has never been at the Fairless Hills plant any policy of racial discrimination.

On the day of oral argument on class action certification, Curtis Worthy, currently an employee of U. S. Steel at the Fairless Hills plant, petitioned for intervention or joinder as a party plaintiff in a belated attempt to bolster the individual plaintiffs' standing as a representative of a broad class including present employees. This petition was denied.[1] (See Order, immediately below.)

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1. On October 15, 1974, Worthy filed suit in the Eastern District of Pennsylvania, which is styled as a class action, entitled *Worthy v. United States Steel Company, et al.*, Civil Action No. 74-268.

During the eighteen month period since this action was filed, no other present or former employees have filed any actions relating to the said plant.

D. The Order Appealed From Certifying the Action as a 23(b)(2) Class Action.

Following briefing and oral argument, Judge Newcomer on September 16, 1974, handed down a Memorandum and Order. The Order in its entirety is as follows:

> "AND NOW, to wit, this 16th day of September, 1974, plaintiffs' amended Motion for leave to add Curtis Worthy as plaintiff in the above captioned action is hereby DENIED.
>
> "Plaintiffs' motion to certify the below defined class as a proper class under Rule 23(a)(1-4) and 23 (b)(2) of the Federal Rules of Civil Procedure is hereby GRANTED. The class in this action shall consist of:
>
> a. all blacks now employed or who might be employed in the future by United States Steel Corporation at its Fairless Hills, Pennsylvania plant; all blacks who were employed by the company from July 2, 1965 to the present date, but who are no longer employed there; and all blacks who unsuccessfully sought employment at the Fairless Hills plant at any time between July 2, 1965 and the present date;
>
> b. all blacks who are represented, or who might be represented in the future by defendant labor organizations at the Fairless Hills, Pennsylvania plant; and all blacks who were represented by defendant labor organizations at the Fairless Hills plant from July 2, 1965 to the present date.
>
> AND IT IS SO ORDERED."

U. S. Steel has contended and continues to assert that this action is not appropriate for class action treatment because, *inter alia:*

(a) The plaintiffs have failed to meet the burden of establishing credible evidence to support all the mandatory requirements of Rule 23(a) and 23(b)(2);

(b) Plaintiffs, as three former employees, should not be permitted to represent all present, as well as past and future black employees and applicants seeking relief regarding every facet of an employer's relationship with its current and past and future employees—and as to matters in which the individual plaintiffs have no interest, stake or standing;

(c) This action may not be brought as a (b)(2) class action since there has not been a finding that U. S. Steel has acted or refused to act upon grounds generally applicable to the class;

(d) The Court should have declined to grant the broad nearly unlimited class action status certified in this case because to do so is duplicative of issues already settled and for which the machinery for their resolution was established (and is currently working) by the nationwide steel industry Consent Decrees entered into between the United States Government, the United Steelworkers of America and nine of the major United States steel producers in *United States v. Allegheny-Ludlum Industries, Inc.*, Civil Action No. 74-P-339 (N. D. Ala., April 12, 1974), all of whose provisions apply specifically to U. S. Steel's Fairless Hills plant, the plant involved herein;

(e) The Court should have denied class action status where defendant opposed it as unnecessary to protect it from one-way intervention. (See *Katz v. Carte Blanche,* 496 F. 2d 747 (3d Cir. 1974).);

(f) The Lower Court should have denied class action certification, at least pending a determination of the validity of the individual claims for discrimination. See *Nash v. Boeing,* 63 F. R. D. 451 (E. D. Pa. 1974), (plaintiffs' appeal quashed, U. S. C. A. for Third Circuit, No. 74-1775, Order of October 11, 1974).

On October 15, 1974, U. S. Steel filed a Notice of Appeal pursuant to 28 U. S. C. §1291 from Judge Newcomer's Order granting plaintiffs' class action motion. The Appeal was docketed on November 25, 1974, and thereafter plaintiffs filed a Motion to Dismiss.

The Third Circuit on January 7, 1975 entered the Order quoted at page 2 above, granting Plaintiffs' Motion to Quash the appeal.

U. S. Steel respectfully petitions Your Honorable Court to issue a writ of certiorari to the Third Circuit Court of Appeals so that that Court may have the opportunity to hear the merits of U. S. Steel's appeal from the Order granting class certification.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF THE FIRST INSTANCE.

Federal jurisdiction below derived from the Act of Congress July 2, 1964, as amended, Title VII of the Civil Rights Act of 1964, and the Civil Rights Act of 1866, 42 U. S. C. §1981.

REASONS FOR ALLOWANCE OF THE WRIT.

A. This Case Meets the Test for Immediate Appellate Review.

This Appeal from an Order granting class action status is appealable under 28 U. S. C. § 1291 as set forth in the decisions of this Court in *Eisen v. Carlisle & Jacquelin, supra,* and *Cohen v. Beneficial Loan Corp.,* 337 U. S. 541, 546 (1949), as discussed in *Eisen,* 417 U. S. at 171-172.

The facts of this case meet the tripart test of *Eisen* and *Cohen,* and the Court of Appeals for the Third Circuit erred in failing to find that it had appellate jurisdiction under 28 U. S. C. § 1291 and to permit U. S. Steel to file its brief on the merits in this matter.

Mr. Justice Powell, speaking for this Court in *Eisen,* cited *Cohen v. Beneficial Loan Corp.,* for the proposition that the test of appealability is not whether the Order "terminates an action"—but rather that the requirement of finality is to be given a "practical, rather than a technical construction."

In *Eisen,* the court characterized the initial issue before it:

> "At the outset, we must decide whether the Court of Appeals in *Eisen III* had jurisdiction to review the District Court's *orders* permitting the suit to proceed as a class action and allocating the costs of notice." 417 U. S. at 169 (emphasis added).

It is clear that from the word "orders" that the Court was dealing with the reviewability of the District Court's order granting class action status, as well as the order allocating notice costs.

The Court then continued:

> "Respondents counter by asserting two independent bases for appellate jurisdiction: first, that the orders in question constituted a 'final' decision within the meaning of 28 U. S. C. § 1291 and were therefore appealable as of right under that section; and second, that the Court of Appeals in *Eisen II* expressly retained jurisdiction pending further development of a factual record on remand and that consequently no new jurisdictional basis was required for the decision in *Eisen III*. *Because we agree with the first ground asserted by Respondents* we have no occasion to consider the second." 417 U. S. at 169-70 (footnote omitted, emphasis added).

Thus, it is clear from this Court's opinion in *Eisen* that in the circumstances of that case, the class action determination was appealable as of right under § 1291.

This Court's opinion makes clear that the grant of all class actions are not automatically appealable and we make no such claim here. Rather, the question is whether this case meets the criteria set forth in *Cohen v. Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949) as discussed in the *Eisen* opinion, 417 U. S. at 171-172.

B. The Facts of This Case Meet the Eisen-Cohen Test.

The facts in this case in all respects meet the test for immediate appellate review—in that they present "a collateral matter that could not be reviewed effectively on appeal from the final judgment." *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 at 171. In *Cohen v. Beneficial Loan Corporation*, 337 U. S. 541 at 546, cited with approval in *Eisen, supra* at 171-172, the Supreme Court laid down standards as to those decisions on collateral issues which

should be promptly heard on appeal before final judgment—i.e., "a decision which finally determines:

¶ Claims of right separable from and collateral to rights asserted in the action;

¶ Too important to be denied review; and

¶ Too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (paragraphing added for clarity).

In the instant case, three former employees, one of whom retired on voluntary pension, and the other two with abysmal records of absenteeism and poor work records would, by virtue of the decision of the District Court be permitted to represent some 900 of U. S. Steel's present black employees at its Fairless Hills plant, and many thousands of past and future black employees and applicants. Clothed with this authority, they would have the power to:

¶ Subject U. S. Steel to extraordinarily burdensome and expensive discovery alleged to be related to the class, on a wide range of issues relating to every facet of U. S. Steel's employment relationship with its present employees at the Fairless Hills plant and totally unrelated to their individual claims. In fact, plaintiffs, subsequent to the Third Circuit's Order filed 124 Interrogatories, totaling, with all subparts, nearly 700 separate questions. (See affidavit of S. G. Clark, Jr. reprinted in the Appendix to this brief and discussed at pp. 15-16 below.)

¶ Disrupt U. S. Steel's relations with its current employees and to stir up broad-based conclusory charges of race discrimination not heretofore asserted in any litigation relating exclusively to U. S. Steel's Fair-

less Hills plant, except in the one instance of plaintiff Worthy, whose application for intervention has been denied.

¶ Subject U. S. Steel to relitigating at great expense and time the issues settled or for which machinery for their resolution has been established by the nationwide Consent Decrees in *United States v. Allegheny Ludlum Industries, Inc., et al.*, Civil Action No. 74-P-339 (N. D. Ala., April 12, 1974). These decrees which apply to the Fairless Hills plant were the subject of months of discussions and negotiations between the nine major steel producers in the country (including U. S. Steel), the Steelworkers union, and representatives of the United States Government, including the Department of Labor, the Department of Justice and the Equal Employment Opportunity Commission.

This case meets each of the *Cohen* tests for collateral appeal under 28 U. S. C. § 1291:

(1) *"Claims of right separable from and collateral to rights asserted in the action."*

The decision of the district court granting class standing is separable from, and independent of the claims of individual discrimination asserted by the former employees, for which they seek damages and reinstatement. Whether each of the named plaintiffs has a claim for individual discrimination is independent of the question whether they have the right to represent all of U. S. Steel's present and former employees as a class.

(2) *"Too important to be denied review."*

The decision granting class standing is clearly too important to be denied review. If it were later determined

that a (b)(2) class action should not have been granted, then the harm suffered by U. S. Steel (1) in being subjected to broad discovery on every detail of the past and current terms and conditions of employment at Fairless Hills,[2] and (2) in being subjected to relitigating the issues which have been resolved by the Steel Industry Consent Decrees in *Allegheny Ludlum, supra,* could not be undone. Additionally, the needless expense in dollars and time to both the parties and the court could never be recovered.

Plaintiffs have in fact filed an initial wave of discovery, by Interrogatories, Second Set, consisting of some 124 in number with approximately 700 sub-parts. As the Affidavit of S. G. Clark, Jr. ("Clark Affidavit") which was filed with the Court of Appeals with U. S. Steel's Petition for Rehearing sets forth, responding to those Interrogatories which are relevant only to the class action will cost United States Steel tremendous expense in time and dollars, over $135,000, which can never be recovered if it is ultimately determined that the decision of the lower Court granting class action status was, as we contend, in error. In addition, as set forth in the Clark Affidavit, if this case is tried as a class action as presently defined, U. S. Steel will incur additional costs of many hundreds of thousands of dollars due solely to the class action aspects, as to which U. S. Steel now seeks review.

As further appears from the Clark Affidavit, plantwide seniority has been put into effect at U. S. Steel's Fairless Hills plant. And there is now well under way, pursuant to Consent Decree I three separate Consent Decree Implementation Committees at Fairless Works, which include representatives from management, the Steelworkers union, the government and from minority groups. The Plant Implementation Committees are currently deciding (and

2. See Plaintiffs' Interrogatories to Defendant United States Steel—Set No. 2.

implementing) a host of issues at the Fairless Hills plant which duplicate or overlap the issues sought to be raised by the individual plaintiffs and their counsel.

(3) *"Too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."*

Finally, the decision granting class status is independent of the individual claims of discrimination so that appellate consideration should not be deferred until the whole case has been decided. Whether U. S. Steel has discriminated in its employment practices with respect to each of the named plaintiffs is totally unrelated to the question of whether these employees, two of whom have poor work records, could represent 900 current of U. S. Steel's employees, plus all past and future black employees and applicants.

The plaintiffs are in no way prejudiced by permitting such an appeal, because they could still move forward with their damage claims and requests for reinstatement. Additionally, there is no need for class action status to make the individual plaintiffs' claims attractive to competent counsel, where as here, there is statutory authority, for awarding reasonable attorneys' fees and costs in each of plaintiffs' individual actions. *Cf. Hackett v. General Host Corporation,* 455 F. 2d 618 at 622-623; and see *Katz v. Carte Blanche,* 496 F. 2d 747 at 758, *cert. denied,* 43 U. S. L. W. 3213 (October 15, 1974).

These three factors—the lack of prejudice to the plaintiffs if the appeal is granted, the harm to U. S. Steel if an appeal is denied, and it is later determined that class standing was improperly granted, and the independence of the order granting class standing from the individual claims of discrimination—clearly indicate that appellate consideration in this case should not be deferred until the whole case is adjudicated.

C. Reason and Common Sense Require That the Appeal to the Third Circuit Court of Appeals Be Allowed.

We are mindful of the long-standing and understandable concern of members of this Court and the Court of Appeals for the Third Circuit about being swamped with appeals if it relaxed its strict rule limiting appeals under 28 U. S. C. § 1291 from final judgments. But, as noted above, this relaxation is required by this Court's decision in *Eisen*.

Furthermore, can it be seriously questioned that concerns about efficiency and case loads must ultimately yield to the needs of justice? Additionally, reviewing the grant of class action status[3] will not, as a practical matter, we respectfully suggest, result in any substantial increase in case loads—for clearly once the court has reviewed several class action cases, a body of case law will soon emerge for the benefit of the lower courts, litigants and their counsel, that will eliminate the need for appeals except in very unusual cases.

Finally, where, as here, the lower court refuses to certify under § 1292(b), there is no other effective way that such an important matter as this can be reviewed before incurring harm to a party and needless expense and waste of judicial time that cannot later be undone, if appellate review indicates after final judgment that the lower court was wrong.

Where there has been such a palpable error of law as committed by the lower court in this case, we submit that the defendant should have an opportunity to be heard on

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3. There is a vastly different situation concerning Orders denying class action status. Here, where class action status has been granted, as seen by the facts in the instant case, an irreversable chain of events is set in motion—one that can never be reviewed or undone on appeal after the fact.

the merits of whether, under the special circumstances of this case, the class action determination was proper.

D. The Questions Presented by the Appeal to the Court of Appeals Are Substantial.

U. S. Steel has vigorously opposed a (b)(2) class action in this case on the grounds that (a) there is no finding and no evidence in the record that it "has acted or failed to act on grounds generally applicable to the class" [Rule 23(b)(2)] and (b) plaintiffs, as former employees, are not members of the class of present employees and do not have standing to assert and have a conflict of interest with respect to claims of present employees.

Logic, common sense, and the weight of authority support the position that subsection (b)(2) of Rule 23 deals only with admitted action, where the issue is not whether an act occurred, but whether it was *legal.* See, for example, *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), a 23(b)(2) class action where defendant admitted that before 1962 it hired blacks only for certain departments and that certain collective bargaining agreements were entered into after 1962, but vigorously although unsuccessfully contested that the seniority system established by these collective bargaining agreements were discriminatory or in violation of Title VII. The issue in *Robinson* was thus whether the seniority system should be enjoined.

The Court below has erroneously positioned its entire claim to jurisdiction under section (b)(2) of Rule 23 on the premise that a conclusory allegation in the complaint of "racial discrimination" is sufficient. But in light of U. S. Steel's vigorous denials, both as to class discrimination and individual discrimination, this hardly qualifies as the kind of admitted action that is a basic jurisdictional requirement for class action treatment under (b)(2).

Any doubt as to the sufficiency of a bare conclusory allegation in a complaint to establish a mandatory requirement for class action treatment was conclusively put to rest by this Court in its decision in *Eisen*, where this Court, 417 U. S. at 178, quoted with approval from Judge Wisdom's Opinion in *Miller v. Mackey International*, 452 F. 2d 424 at 427 (5th Cir. 1971) to the effect that:

> "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."

This Court has mandated that the class issue must be determined before a decision on the merits: *American Pipe & Constr. Co. v. Utah*, 414 U. S. 538 (1974), and *Eisen, supra.* This requires that there be a determination of the jurisdictional facts for class action status, which in this case has not been done.

Furthermore, U. S. Steel has opposed plaintiffs' class claims on the grounds that as former employees, they are not members of and have a conflict of interest with the members of the class of present employees whom they now pursuant to the lower court's order represent. As former employees, plaintiffs do not have standing to assert claims on behalf of a class of present employees. *Kaufmann v. Dreyfus Fund, Inc.*, 434 F. 2d 727 (3rd Cir. 1970), and see *Eisen, supra.*

CONCLUSION.

For the reasons stated above, we respectfully request that this Court after review issue a Writ of Certiorari to the Third Circuit Court of Appeals to reinstate the appeal of U. S. Steel pursuant to 28 U. S. C. § 1291 so that the appeal of the decision granting class certification may be heard on the merits.

Respectfully submitted,

HENRY T. REATH,
JANE D. ELLIOTT,
DUANE, MORRIS & HECKSCHER,
Attorneys for Petitioner, United States Steel Corporation.

Of Counsel:
S. G. CLARK, JR.

Appendix.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 74-2188.

MOSES DICKERSON, ET AL.,
Appellees

v.

UNITED STATES STEEL CORPORATION, ET AL.,
Appellants.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA } *ss.:*

AFFIDAVIT OF S. G. CLARK, JR.

I am S. G. CLARK, JR., Esquire, a member of the Bar of the Supreme Court of Pennsylvania, the Federal District Courts for the Eastern and Western Districts of Pennsylvania, and the Court of Appeals for the Third Circuit.

For fourteen years I have been employed as an attorney in the Law Department of the United States Steel Corporation (herein "USS"). I am presently General Attorney-Labor, specializing, in among other aspects of labor law, the handling of matters under Title VII, Civil

Rights Act of 1964, including EEO charges and litigation filed under such Title.

As part of my duties, I have had the responsibilities to coordinate and work with retained counsel, when employed, members of USS Personnel Services and Labor Relations Departments, and USS employees at the operating plants in labor law matters. As part of these responsibilities, I have coordinated activities with the above in day-to-day matters during the litigation stage, including pre-trial discovery, and assisting in the preparation and submission of documents and Answers to Interrogatories in the majority of those equal employment opportunity civil actions in which USS has been involved.

I have read and am familiar with Plaintiffs' Second Interrogatories to Defendant USS consisting of a total of 124 Interrogatories (many Interrogatories contain numerous separate questions) and 58 pages, which were filed on January 6, 1975 by Plaintiffs.

Such Interrogatories inquire into every phase of USS personnel-labor relations practices and policies with all its approximately 10,000 presently employed employees at Fairless Works. Since the Interrogatories cover employees who were employed as far back as 1960 in some instances and pertain to applicants for jobs who may not have been hired, the total number of employees covered by the Interrogatories is much higher than the approximately 10,000 current employees.

The largest number of Interrogatories do not relate to Plaintiffs' individual claims of discrimination, but rather would be relevant only if plaintiffs are permitted to represent the broad class, as certified by Judge Newcomer, and which certification USS now asks Your Honorable Court to review on appeal.

As to those Interrogatories which relate only to the claims of individual discrimination, arrangements are

being made now to assemble the records and data which are responsive to these Interrogatories.

However, with respect to those Interrogatories relating exclusively to the class action issue, the task merely to locate, identify, review and collect the original records, if available, responsive to those Interrogatories, is onerous and burdensome.

Based on my past experience, I have estimated the time and expenses to USS, including time of: (1) attorneys, (2) paralegal assistants, (3) secretaries, (4) clerks of USS retained counsel and the USS Law Department, (5) management personnel, (6) assistants, (7) clerks, (8) secretaries, and (9) other personnel at USS Headquarters and at Fairless Works required to assist in responding to the Interrogatories pertaining to the broad class action as certified below by Judge Newcomer.

Under all the circumstances and based upon my experience (and after consultation with others who have knowledge of USS Fairless Works and the availability of records) it is my opinion that a total of over 8,000 man hours of time would be expended at a total cost of over $135,000.

The above figures relate only to plaintiffs' second set of Interrogatories. In my experience in pretrial discovery of Title VII cases, there are frequently additional sets of interrogatories, oral depositions, requests for admissions, and for production of documents which require substantially greater additional time but at this time no precise estimate can be made of such expenses.

Furthermore, should the case ultimately go to trial as a class action with all the issues included which plaintiffs now seek to raise, in my opinion such would extend the trial of Plaintiffs' individual actions by at least an additional three months of trial time, at greater costs to

USS, including the fees of retained trial counsel, in the many hundreds of thousands of dollars.

As pointed out in the various pleadings heretofore filed with Judge Newcomer and with this Court, USS, eight other major steel producing companies, the Government, and the United Steelworkers of America, are currently deeply involved in implementing the provisions of the two nationwide steel industry Consent Decrees entered into before Judge Sam C. Pointer of the Northern District of Alabama in the case of *United States of America v. Allegheny Ludlum,* Civil Action No. 74P339. An Audit and Review Committee, and Implementation Committees at all affected plants, (including Fairless Works) provided for in Consent Decree I have for over six months been at work in applying various procedures to implement and carry out the provisions of Consent Decree I. Consent Decree I has resulted in major changes in USS labor agreements affecting seniority rights and other issues which Plaintiffs seek to raise in the instant case by their class action.

Consistent with the requirements of Consent Decree I, on August 4, 1974 the provisions for systematic relief—*i.e.,* such as plant wide seniority and bidding for job vacancies, was put into effect at the Fairless Works. In addition, pursuant to the provisions of Consent Decree I, an Implementation Committee at the Fairless Works, which includes minority representation as well as a government representation has been chosen. This Committee, which has had numerous meetings, is currently engaged in the function of ensuring implementation of the provisions of Consent Decree I.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

S. G. CLARK, JR., being duly sworn according to law, deposes and states that: I have read the foregoing affidavit of five pages and it is true and correct to the best of my knowledge and information.

S. G. CLARK, JR.

Sworn to and subscribed before me this 21st day of January, 1975.

ELSIE W. CHAMBERLIN
Notary Public
Elsie W. Chamberlin
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires July 5, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 73-1292.

MOSES DICKERSON, ET AL.

v.

UNITED STATES STEEL CORPORATION, ET AL.

AFFIDAVIT.

1. I, Kevin J. Goodwin, make this affidavit in opposition to the motion of plaintiffs for designation as class action pursuant to Rule 23(b)(2) of Federal Rules of Civil Procedure.

2. I am an acting Labor Contract Administrator, Personnel Services Department, of defendant United States Steel Corporation's Fairless Hills, Pennsylvania works ("USS") and I am authorized to make this affidavit.

3. USS Personnel Services Department acts as the custodian of the official employment records of the plaintiffs, Moses Dickerson, Millard Starling, and Eddie Williams, which records are kept by USS in the ordinary course of business.

4. The statements made in this affidavit are made on the basis of my personal knowledge or on the basis of my review of the official employment records of the plaintiffs.

5. The facts of the employment by USS of plaintiff Moses Dickerson are as follows:

a. At interviews in Birmingham, Alabama, in October, 1969, conducted by USS, Mr. Dickerson submitted an application for employment with USS indicating no job preference. He was offered a job at an entry level at the Fairless Works.

b. Neither Mr. Dickerson nor any other person interviewed was offered a skilled position.

c. The only representation made to any applicant with respect to housing or relocation consisted of the willingness of USS to alert the Trenton YMCA and to circularize its employees asking them to provide information concerning housing. USS complied fully with those representations.

d. Dickerson accepted the offer of October, 1969, of an entry level job at the Fairless Works and became an employee there on November 12, 1969.

e. When Dickerson arrived at the Fairless Works, he was given a physical examination, as required of all applicants, and was found to have a restricted physical capacity.

f. No applicant would normally be hired for a production and maintenance job with such a restricted capacity; however, Dickerson was nevertheless offered the entry level job of "janitor" in an attempt to find work for him at the Fairless Works.

g. When Dickerson was interviewed, he stated that he had been arrested once for car theft in 1961 and serve one year in jail as a result. USS shortly thereafter discovered that in fact he had been arrested for burglary and grand larceny on five occasions between 1952 and 1964 and had served approximately seven years in prison, being

last released from prison in January, 1965. Notwithstanding this information USS elected not to exercise its rights under the Basic Labor Agreement against Dickerson who was then a probationary employee but rather kept Dickerson on its payroll. Copies of the Basic Labor Agreements are attached to this affidavit as Exhibits A and B.

h. Dickerson had a history of infractions of USS's Plant Conduct Rules as follows:

Date	*Infraction*	*Discipline*
February 23, 1970	Absenteeism	Written warning
March 19, 1970	Insubordination	Suspended for rest of turn (6.9 hours)
March 20, 1970	Reported for work in an unfit condition, under the influence of liquor	Suspended 1 day
March 23, 1970	Absenteeism	Suspended 1 day
August 4, 1970	Absenteeism	Suspended two days
August 10, 1970	Absenteeism	Suspended 3 days
August 25, 1970	Absenteeism	Suspended five days
September 23, 1970	Absenteeism	Written warning
May 30, 1972	Absenteeism	Suspended two days
June 13, 1972	Absenteeism	Suspended four days
November 9, 1972	Reported for work in an unfit condition— under the influence of liquor	Suspended five days
June 12, 1973	Absenteeism	Suspended five days Extended additional five days after suspension hearing
July 30, 1973	Neglect in performance of duties — by sleeping	Suspended five days

During the period between the infractions of September 23, 1970 and May 30, 1972, Mr. Dickerson was on sick leave for eight months. He was also on sick leave for approximately three months in early 1973.

i. To USS's knowledge, Dickerson never requested a transfer to a skilled position or to a higher paying job

classification within the department in which he was initially assigned. Dickerson permanently waived the right to bid on the only other available job in his unit, truck driver, by filing a job waiver with USS on March 2, 1972.

j. Dickerson received every pay increase required by USS—Steelworker labor agreements.

k. Dickerson never filed a grievance alleging that USS acted improperly toward him.

l. Dickerson voluntarily quit on July 30, 1973.

6. The facts of the employment by USS of plaintiff Millard Starling are as follows:

a. Starling was employed by defendant Corporation on August 22, 1940, at South Charleston, West Virginia.

b. On June 16, 1942, Starling was transferred to the Corporation's Homestead plant.

c. On May 5, 1944, Starling was promoted to the position of Second Helper at Homestead.

d. On December 28, 1944, Starling was transferred to the Corporation's Pittsburgh office.

e. On March 1, 1952, Starling was promoted to the position of Personnel Clerk in the Pittsburgh office.

f. On January 1, 1954, Starling was transferred to the Fairless Works and promoted to the position of Personnel Interviewer.

g. On March 28, 1965, Starling was promoted to the management position of Turn Supervisor—Janitorial Services.

h. On September 15, 1970, Starling informed USS that he wished to retire on pension under mutually satisfactory conditions effective September 30, 1970. The Corporation agreed to this request.

i. During his term of employment at the Fairless Works, Starling never was a member of the bargaining unit represented by defendant, Steelworkers.

7. The facts of the employment by USS of plaintiff, Eddie Williams are as follows:

a. Mr. Williams was interviewed and employed in the same manner as Dickerson, as described above in paragraphs 5(a)-(c).

b. When Williams was initially employed at the Fairless Works on October 28, 1969, consistent with normal employment practice, he was assigned to the entry level job of general laborer in the Open Hearth.

c. After employment at USS there came a time when Williams alleged that he was a qualified welder. Although the plant had no openings for welders at the time, the plant personnel tested his skill by giving him the normal qualifying work assignment. He did not complete that assignment satisfactorily because of broken welds. Williams had the contractual right to protest through the union grievance procedure if he believed the qualifying work assignment to be either non-representative or improperly evaluated; however, he never pursued this right. Thereafter, USS repeatedly offered to retest Williams' skill and arranged for such tests; however, he failed to appear on each occasion on which a test had been scheduled.

d. Williams had a history of infractions of USS's Plant Conduct Rules, as follows:

Date	*Infraction*	*Discipline*
April 9, 1970	Insubordination	Suspended 6.3 hours
April 18, 1970	Absenteeism	Written warning
May 4, 1970	Absenteeism	Written warning

June 28, 1970	Absenteeism	Written warning
July 5, 1970	Insubordination	Suspended 2.5 hours plus two days
July 10, 1970	Left assigned working area without giving notice to supervisor	Suspended 5.5 hours plus two days
October 15, 1970	Absenteeism	Suspended one day
December 12, 1970	Absenteeism, and attendance record showed total of 40 turns absent in 1970	Written warning
January 3, 1971	Absenteeism	Suspended one day
January 28, 1971	Use of threatening language	Suspended seven days
Starting November 23, 1971	Absenteeism	Suspended five days, subject to discharge. When Mr. Williams failed to request a five-day suspension hearing, after letter and telegraphic notice, receipt of which he acknowledged, suspension was converted to discharge, effective January 12, 1972. He was then advised of his right to appeal the discharge under the union contract grievance procedures. He failed to grieve the issue.

In addition to these incidents which resulted in formal discipline Mr. Williams was absent from work on June 15, 1971, after which his foreman gave him an oral warning to improve his conduct. He was also absent on seven days during his probationary period from October 28, 1969, through December 31, 1969. No action was taken concerning these absences.

e. Mr. Williams was ultimately discharged for excessive absenteeism, effective January 12, 1972, approximately two months after he had returned to Birmingham, without notice to the Corporation.

8. In hiring employees for hourly classifications USS normally hires for entry-level jobs, and in the following manner:

a. The applicant completes an application.

b. He is interviewed by an Interviewer of the Personnel Services Department.

c. If there is an opening, the applicant may be interviewed by a management representative of the Department in which the opening exists.

d. The applicant is given a physical examination to determine physical ability to perform the job.

e. The applicant is approved by the Interviewer, and, in those cases in which there is a departmental interview, by the departmental management representative.

9. There are over 100 employees who participate in hiring decisions at the Fairless Works.

10. All corporation management employees, including those who participate in hiring decisions at the Fairless Works, have consistently and repeatedly been instructed to observe the Corporation's policy of equal employment opportunity, both in written policy directives (copies of examples of which will be furnished later) and orally.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

KEVIN J. GOODWIN, being duly sworn according to law deposes and states that he is an acting Labor Contract Administrator, Personnel Services Department, of defendant United States Steel Corporation's Fairless Hills, Pennsylvania works, and that the facts set forth in the foregoing affidavit are true and correct to the best of his knowledge, information and belief.

KEVIN J. GOODWIN.

Sworn to and subscribed before me this 21st day of March, 1974.

ALICE NYCE
Notary Public

ALICE NYCE, Notary Public
Philadelphia, Philadelphia County
My Commission Expires Feb. 6, 1975
[Copy illegible]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 73-1292.

MOSES DICKERSON, ET AL.

v.

UNITED STATES STEEL CORPORATION, ET AL.

MEMORANDUM AND ORDER.

NEWCOMER, *J.* September 16, 1974.

This is an action brought by three blacks who are former employees of defendant United States Steel and former * members of defendant United Steelworkers. The complaint alleges that defendants discriminated against plaintiffs on the basis of their race, in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* and Section 1 of the Civil Rights Act of 1866, 42 U. S. C. § 1981. Specifically, plaintiffs allege that defendants pursued a policy of racial discrimination which was manifested in the treatment of plaintiffs in hiring, promotion, and discipline throughout their tenure at United States Steel's Fairless Hills, Pennsylvania plant.

Plaintiffs bring this action on behalf of themselves and others similarly situated. Plaintiffs move for a determina-

* It is not clear from the record whether plaintiffs are currently members of any of the defendant local unions or defendant international union.

tion of class under Rule 45 of the Local Rules of Civil Procedure of this District. Plaintiffs are applying for class certification under Rule 23(a)(1-4) and (b)(2) of the Federal Rules of Civil Procedure and they seek to represent:

> a. all blacks now employed or who might be employed in the future by United States Steel Corporation at its Fairless Hills, Pennsylvania plant; all blacks who were employed by the company from July 2, 1965 to the present date, but who are no longer employed there; and all blacks who unsuccessfully sought employment at the Fairless Hills plant at any time between July 2, 1965 [1] and the present date;
>
> b. all blacks who are represented, or who might be represented in the future by defendant labor organizations at the Fairless Hills, Pennsylvania plant; and all blacks who were represented by defendant labor organizations at the Fairless Hills plant from July 2, 1965 to the present date.

We find that plaintiffs have met their burden under Rule 23(a)(1-4) and 23(b)(2), and we certify a class which is defined to include all those persons listed above.

JOINDER OF CURTIS WORTHY AS PLAINTIFF.

Subsequent to moving for a class determination, plaintiffs moved to add Curtis Worthy as a plaintiff to this action either by joinder under Rule 20 or intervention under Rule

1. The July, 1965 date is chosen because Title VII became effective upon the date. With respect to the claim based on § 1981, the courts of this district have applied Pennsylvania's statute of limitations, running from six years prior to the filing of the administrative charge with the Equal Employment Opportunity Commission ("EEOC"). Therefore, since the EEOC charges in this case were filed in October, 1971, any class declared under § 1981 could not extend into the past beyond October, 1965.

24. Since plaintiffs admit that they seek Worthy's addition in order to influence the class action determination, and since his presence may bear on this question, we will consider plaintiffs' motion to add Worthy before discussing the class action question.

Under the circumstances presented by plaintiffs' application on behalf of Worthy, the decision to permit his joinder or intervention is one within the discretion of the court. Defendant raises a host of procedural arguments to counter Worthy's addition, but we feel a sounder basis for denial lies in the prejudice which would result to defendant should the Court permit joinder or intervention now that the briefs directed to the class action question have already been filed. Plaintiffs' motion on behalf of Worthy does not reveal in which of Fairless' departments he is employed, what the nature of the alleged discriminatory acts against him were, or whether he is eligible to receive back pay under the consent decrees. (See Section e, *infra.*) All these facts are relevant to the class action question and there is no good reason why plaintiffs should benefit by Worthy's presence if the defendant must argue—and the court must decide—that question without knowledge of the ramifications of this presence.

REQUIREMENTS OF RULE 23.

I. *Plaintiffs' Burden.*

In order for the named plaintiffs to represent the class they seek to represent, they must show that:

> i. the class is so numerous that joinder of all members is impractical;
>
> ii. there are questions of law or fact common to the class;
>
> iii. [their] claims . . . are typical of the claims . . . of the class;

> iv. [they] will fairly and adequately protect the interests of the class. In addition, since plaintiffs have moved for class certification under Rule 23(b)(2), they must show that the defendants have acted or failed to act on grounds generally applicable to the class, which would warrant final injunctive relief or declaratory relief with respect to the class as a whole.

The burden is upon plaintiffs to show that each of these requirements has been met. Eisen v. Carlisle and Jacquelin, 391 F. 2d 555 (2nd Cir. 1968).

Plaintiffs contend that the figure of 839 black employees which was provided by defendant Steel Company, is sufficient to satisfy the numerosity requirement even without considering the number of ex-employees. The alleged policy of racial discrimination, plaintiffs argue, provides a common question of both fact and law. Similarly, the claim of injury from this alleged discriminatory policy is typical of that of the class. Fourth, plaintiffs argue that they will be fair and adequate representatives of the class because they are represented by counsel experienced in civil rights class actions and because they have no interests which conflict with those of the class. In support of the proposition that their status as ex-employees does not represent a conflict with the interests of Fairless' present black employees, which plaintiffs also seek to represent, plaintiffs cite *Johnson v. Georgia Highway,* 417 F. 2d 1122 (5th Cir. 1969) and *Hackett v. McGuire Bros., Inc.,* 445 F. 2d 443 (3rd Cir. 1971) (dictum).

Plaintiffs claim to meet the requirement of (b)(2) because defendants' alleged policy of racial discrimination constitutes action on grounds generally applicable to the class sought here, and that proof of such a policy at trial would make appropriate final injunctive and declaratory relief with respect to the class as a whole.

Defendants have challenged class treatment of this suit on a number of grounds. Since most of these grounds go to a number of the Rule 23 prerequisites—which is not surprising given the substantial degree to which these prerequisites overlap—we will focus on the grounds asserted rather than repeat the above journey through the Rule's subdivisions.

Before discussing defendants' arguments, it should be noted that none of defendants' arguments against class certification under 23(b)(3) are relevant, since plaintiffs have asked for (b)(2) certification only, at least at this juncture. Certification under (b)(2) is proper when only declaratory and/or injunctive relief is sought; an action seeking money damages must await (b)(3) certification. Paddison v. Fidelity Bank, 60 F. R. D. 695 (E. D. Pa. 1973); Williams v. Sheetmetal Workers Local 17, et al., 59 F. R. D. 49 (E. D. Pa. 1973). Second, the defendant unions have opposed class certification solely on the grounds that it would be inappropriate or untimely in view of the industry-wide consent decrees; therefore in discussing all issues save the consent decrees' impact reference will be made to defendant United States Steel alone.

II. *Defendants' Arguments Contra Class Certification.*

a. *The named plaintiffs are not entitled to relief on the merits of their case.*

Defendant claims that none of the requirements of 23(a) are met because the plaintiffs were not discriminated against. An affidavit signed by an officer of defendant United States Steel's Labor Relations department represents that the allegations of the three named plaintiffs are untrue. However, a motion for class certification is neither the proper time nor the appropriate procedure for deciding the merits of the case. Kahan v. Rosenstiel, 424 F. 2d 161

(3rd Cir. 1970). We do not feel that *Huff v. N. D. Cass Co. of Alabama,* 485 F. 2d 710 (5th Cir. 1973), supports defendants' position, since that case expressly states that:

> "this court is committed to the principle that the standard for determining whether a plaintiff may maintain a class action is not whether he will ultimately prevail on his claim." 485 F. 2d 712 (5th Cir. 1973)

b. *The named plaintiffs may not represent a class including present employees.*

Defendant claims that the named plaintiffs' status as ex-employees precludes the certification of a class which includes present employees. As ex-employees, defendant asserts, plaintiffs' claims share no question of fact or law with those of the present employees; their claims are not typical of those of the present employees; and they cannot fairly and adequately represent present employees because their claims are not co-extensive with those currently employed and because there are conflicts of interest between past and present employees, in that any reinstatement of the former will limit the opportunities for promotion or even jobs for the latter.[2]

Defendant refers the Court to *Jenkins v. General Motors Corp.,* 354 F. Supp. 1040 (D. Del. 1973); *Tolbert v. Daniel Constr. Co.,* 332 F. Supp. 772 (D. S. C. 1971); *Hyatt v. United Aircraft Corp.,* 50 F. R. D. 242 (D. C. Conn. 1970); *Burney v. North American Rockwell Corp.,* 302 F. Supp. 86 (C. D. Cal. 1969) as authority for its position. In *Jenkins,* the Court denied class certification because

2. Defendant also claims that the named plaintiffs lack standing to prosecute this action because as former employees they are beyond the impact of any discriminatory conduct by defendants. Defendant relies on *O'Shea v. Littleton,* — U. S. —, 42 U. S. L. W. 4139 (Jan. 15, 1974), but the named plaintiffs in *O'Shea,* unlike those in the present case, did not allege that they had themselves been injured by discriminatory conduct on defendants' part.

plaintiff failed to show that he would fairly and adequately represent the interests of the class. The Court declared that since plaintiff, who had not been employed by defendant for over four years, did not request reinstatement in his prayer for relief there was no reason to believe that he had a personal interest in establishing the existence of discrimination from the time he left defendant to the time of suit. 354 F. Supp. at 1040. In *Tolbert*, an individual who had been out of the defendant's employ for two years was not permitted to represent a class which encompassed defendant's present employees. The Court stated:

> "Having had no contact with defendant for more than two years, [plaintiff] has no personal knowledge of defendant's policies during that period or at the present time. In short, whatever might be his capacity to represent Negroes employed prior to his resignation, he certainly cannot be said to be in a position fairly and adequately to protect the interests of the entire class he purports to represent."

As an additional factor weighing against class representation, the *Tolbert* Court noted that the plaintiff had worked in only one of defendant's many job lines.

In *Hyatt v. United Aircraft*, a class was denied where the plaintiff had voluntarily resigned defendant's employ two years prior to suit. The Court expressed concern that plaintiff's lack of personal knowledge of defendant's operations during the intervening two years would prevent him from adequately representing the interests of defendant's present employees. In *Burney v. North America Rockwell*, a former employee was denied class representative status where two years had elapsed since he had last worked for Rockwell. The Court felt that plaintiff would have no in-

terest in proving acts of discrimination against other members of the class, since "in order to obtain relief for himself, plaintiff need not necessarily prove every act of alleged discrimination against Negroes that defendant may have committed. . . ." 302 F. Supp. at 90.

What these cases are concerned about is that an ex-employee will either lack a personal stake in proving discrimination against present employees or lack the personal knowledge instrumental in proving such discrimination. In regards to the first fear, the named plaintiffs here have requested reinstatement, as well as advancement to those positions which they would have held but for the alleged discrimination. Moreover, the plaintiffs have an interest in showing present discrimination in order to prevail on the merits; certainly the statistics regarding present employment patterns or the testimony of those presently employed will be easier for plaintiffs to amass than would job patterns or testimony of past employees, many of whom may be dispersed throughout the country.

As for the concern that plaintiffs will lack personal knowledge of defendant's practices since their departure or of practices in other departments than those in which they had been employed, at least one of the named plaintiffs was still employed by defendant at the time suit was filed. (As for the other two, one retired three years before filing of suit and the other allegedly quit in protest of defendant's discriminatory practices two years prior to suit.) To require that plaintiffs allege personal experiences of discrimination in all areas of defendant's operation would mean that only a large proportion of the class could properly represent the class; to require that plaintiff be employed by defendant at the time the class is determined rather than as of the time suit is filed would mean that no employee alleging discriminatory discharge could ever be a class

representative. (Except for the narrow class of those discriminatorily discharged.) We believe that plaintiffs have shown a recent enough and a broad enough experience with defendant's operations to sustain the conclusion that they will be fair and adequate representatives of the class.

c. *The named plaintiffs have not met the requirements of 23(b)(2).*

Once plaintiffs have shown that their action qualifies as a class action under 23(a)(1-4), they must also show that it is appropriate for class action treatment under 23(b)(1)(b)(2), or (b)(3). The plaintiffs in this case seek class certification under (b)(2), which states that an action may be maintained as a class action if:

> ". . . the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ."

In moving for certification under (b)(2) the plaintiffs here rely heavily on the proposition that "racial discrimination is by definition class discrimination", *Hall v. Werthan Bag Co.*, 251 F. Supp. 184, 186 (M. D. Tenn. 1966); and on those cases applying this proposition to justify (b)(2) certification in Title VII context. Johnson v. Georgia Highway Express, Inc., 417 F. 2d 1122 (5th Cir. 1969); Jenkins v. United Gas Corp., 400 F. 2d 28 (5th Cir. 1968); Paddison v. Fidelity Bank, 60 F. R. D. 695 (E. D. Pa. 1973); Williams v. Local 19 Sheet Metal Workers, et al., 50 F. R. D. 49 (E. D. Pa. 1973); Reyes v. Missouri-Kansas-Texas R. R. Co., 53 F. R. D. 293 (D. Kan. 1971); Hall v. Werthan Bag, cited *supra*.

The reasoning behind this proposition is simple. (b)(2) certification requires that a defendant act on grounds gen-

erally applicable to the class; allegations of a policy of racial discrimination by definition concern action touching upon a wide group, since a series of actions would not be a policy unless they were consistent and numerous. As for the (b)(2) requirement that injunctive relief be appropriate "with respect to the class as a whole" the argument goes that even where a policy of discrimination has been shown in an individual action, the court would grant an injunction prohibiting the defendant from discriminating against the members of the plaintiff's racial group.[3] Therefore, since group injunctive relief would be appropriate in a successful individual Title VII action, it is no less appropriate in a Title VII class action.

Defendant does not quibble with this reasoning; it attacks its very roots. It is defendant's contention that a class action is maintainable under (b)(2) only when it is admitted or established as fact that the party opposing the class has acted on grounds generally applicable to the class, and the only question for decision is whether or not that action is legal. Thus cases in which (b)(2) certification is proper, defendant urges, are those raising only issues of law.

Defendant acknowledges that there are cases with a contrary interpretation of (b)(2), but it attributes these to a confusion of the "common question of fact" standard of 23(a)(2) with the "grounds generally applicable" standard of (b)(2), an overbroad reading of the advisory committee's notes accompanying (b)(2), or inadequate briefing by previous defendants.

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3. This argument rests on the unlikelihood of a court's enjoining further racial discrimination against one individual but leaving the defendant free to discriminate against the other members of plaintiff's racial group. In other words, the right to be free from racial discrimination in the terms of one's employment is seen by these authorities as a right which it would be impossible to vindicate without at the same time vindicating the rights of every member of the discrimination's target group.

Defendant's contention is, upon first impression, persuasive. The full text of the advisory committee's notes concerning 23(b)(2) states:

> "This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See Potts v. Flax, 313 F. 2d 284 (5th Cir. 1963); Bailey v. Patterson, 323 F. 2d 201 (5th Cir. 1963); cert. denied, 377 U. S. 972 (1964); Brunson v. Board of Trustees of School District No. 1, Clarendon Cty., S. C., 311 F. 2d 107 (4th Cir. 1962), cert. denied, 373 U. S. 933 (1963); Green v. School Bd. of Roanoke, Va., 304 F. 2d 118 (4th Cir. 1962); Orleans Parish School Bd. v. Bush, 242 F. 2d 156 (5th Cir. 1957), cert. denied, 354 U. S. 921 (1957); Mannings v. Board of Public Inst. of Hillsborough County, Fla., 277 F. 2d 370 (5th Cir. 1960); Northcross v. Board of Ed. of City of Memphis, 302 F. 2d 818 (6th

Cir. 1962), cert. denied, 370 U. S. 944 (1962); Frasier v. Board of Trustees of Univ. of N. C., 134 F. Supp. 589 (M. D. N. C. 1955, 3-judge court), aff'd, 350 U. S. 979 (1956)." 39 F. D. R. 102.

While the text of this note does not support defendant's assertion that (b)(2) covers only those situations where it is not factually disputed that the defendant acted on grounds generally applicable to the class, seven of the eight cases chosen as demonstrative of the proper application of (b)(2) were cases attacking *de jure* school segregation, a practice of unquestionable general application.[4]

However, defendants' interpretation of the advisory committee's notes would not only prevent (b)(2) class treatment for suits in which the question of whether the defendant acted on grounds generally applicable to the class is contested, but also those suits where defendant admits following a codified rule or practice but denies that it has a general, uniform effect on any class. Such a situation was presented in *Rowe v. General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972), where defendant admitted that a prospective applicant for promotion must be approved by his immediate foreman before he could be promoted, but denied that this practice resulted in racial discrimination. The *Rowe* court determined that a (b)(2) class certification was proper, a decision with which defendant agrees (See Appendices to Brief of defendant, section c, p. 14). Yet in *Rowe* there remained to be litigated the question of whether the admitted practice uniformly and disproportionately affected the class of black employees. Admittedly, the factual questions raised by the present case are more complex than those in *Rowe*, since there is no codified practice or procedure to begin from. But the possible complexity

4. The eighth case was Brunson v. Board of Trustees, 311 F. 2d 107 (4th Cir. 1962), where it was not clear from the record whether defendants admitted that they ran a segregated school system.

of the factual issues does not alter the fact that final injunctive relief with respect to the class as a whole, the focus of concern in Section (b)(2), is no less appropriate whether it is a procedure which results in racial discrimination or a policy of racial discrimination which is made out. As observed above, defendants have deemed (b)(2) class treatment appropriate when there exist factual questions as to the condemned practices general applicability to the class; the degree of complexity which these factual questions may pose is relevant to the maintainability of a class action under 23(a)(2) or 23(b)(3) but not under 23(b)(2).

That the Advisory Committee did not intend that only situations in which the defendant admitted segregation were proper for (b)(2) treatment can be understood if the Committee's notes are put in their historical context. At the time the notes were written (1966) the landmark civil rights-class action cases were the school desegregation cases. Title VII was at that time less than two years old; the opinion of Judge Gray in *Hall v. Werthan Bag Co.*, 251 F. Supp. 184 (M. D. Tenn.) which originated the doctrine that racial discrimination in employment was by definition class discrimination, was itself decided in 1966. Therefore, the Advisory Committee's citation of the school desegregation cases need not be taken to mean that (b)(2) class actions are only appropriate in that area, but merely a reflection of the fact that the legal challenges to racial discrimination were first brought against those institutions where white and black were visibly and undeniably separated.

d. *Under Title VII the right to bring a pattern and practice action is vested exclusively in the EEOC.*

Defendant claims that plaintiffs cannot mount a broad attack on policy of discrimination but can only litigate those limited manifestations of such a policy which may affect

them personally. Defendant claims that this result is mandated by statute, decision, and sound judicial policy. The statute in question is 42 U. S. C. § 2000e-6(a); which authorizes the EEOC to bring suit where a 'pattern or practice' of racial discrimination is present in an employment practice. Defendant maintains that this vests exclusive authority to raise pattern or practice issues in the EEOC. The decision relied upon by defendant is *McDonnell Douglas Corp. v. Green,* 411 U. S. (1973), which states that proof of a pattern and practice of discrimination would not in itself justify granting relief to an individual plaintiff, but is merely one method of proving that the particular act of which the private litigant complains was discriminatory. The policy advanced by defendant is the admirable policy of judicial restraint, which, it is insisted, should inhibit the courts from attempting to accomplish through Title VII class actions what the EEOC is much better equipped to do through pattern and practice suits.

The Supreme Courts' continued assertion of the importance of private actions to the enforcement of Title VII undercuts defendant's argument that such actions are restricted to redressing the individual litigant's injuries. In Alexander v. Gardner-Denver, — U. S. —, 7 FEP 81, 1974, a case decided subsequent to *Green,* the Court stated:

> . . . although the 1972 amendment to the Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII [citation omitted]. In such cases, the private litigation *not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.* [emphasis supplied]. Hutchings v. United States Industries, Inc., 428 F. 2d 303, 310 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416

F. 2d 711 (7th Cir. 1969); Jenkins v. United Gas Corporation, 400 F. 2d 28 (5th Cir. 1968). *See Also* Newman v. Piggie Park Enterprises, Inc., 390 U. S. 400 (1968).

Each of the cases cited with approval in this passage were broadly defined Title VII class actions. Nor is there any conflict between *Green* and *Alexander,* since *Green* merely discusses the means by which a plaintiff, whether in in individual or a class Title action, can make a *prima facie* showing of unlawful discrimination. As for judicial restraint, while it is true that the EEOC suits such as the one which resulted in the consent decrees binding the nine largest steel companies may represent a more effective weapon against racial discrimination than the private class action approach, this Court would lack judicial restraint if its opinion as to the relative effectiveness of the two approaches led it to foreclose one approach in the face of Congress' determination that they should co-exist.

e. *The consent decrees entered into between defendants and the federal government bar a class in this suit.*

On April 12, 1974 several agencies of the federal government entered into a consent decree with the Steelworkers Union and most of the large steel companies, including defendant United States Steel, in settlement of a suit alleging racially discriminatory practices by the steel companies. United States, et al. v. Allegheny-Ludlum, et al., No. 74P339 (N. D. Ala.). The decree provides for an injunction against any discrimination by defendants therein on the basis of race, and a wide-ranging reform of defendants' seniority and transfer policies. In addition, the decrees provide for an as yet unspecified amount of "back pay" damages to be paid to a particular category of employees should they be willing to waive all claims for past and present discrimination.

Defendants argue that the relief provided by the consent decrees moots this action, but this position is rejected by the Judge approving the consent decrees, who expressly observed that "the resolution in this forum of issues between the government and the defendants does not preclude additional—or even inconsistent—relief in favor of private parties in other litigation". Memorandum and Order dated June 7, 1974, United States v. Allegheny-Ludlum Industries, Inc., et al., Civil Action 74-P339S, at p. 6. This Court might, if plaintiffs are successful on the merits, issue an injunction differing from the one consented to in Allegheny-Ludlum in the specifics of its scope or implementation.

Defendants also argue that the decrees' back pay/waiver provisions and their uncertain impact on plaintiffs' putative class prevent plaintiffs' claims from being typical of those of the whole class and create a conflict of interest between plaintiffs and the class, in that none of the named plaintiffs are eligible under the back pay provisions while an unknown number of the putative class members may be eligible. This Court could understand such an argument if the potential class representatives were eligible to waive their claims for back pay since plaintiffs' "dropping out" could seriously jeopardize the interests of the remaining class litigants. But where none of the named plaintiffs could thus remove themselves, there is little basis for defendants' position. Nor should this Court delay certification pending the completion of the waiver process, for although this would clear up some uncertainties as to the numerousness of the class it would not be faithful to Rule 23(c)(1) which requires that class determination be made as soon as practical after suit is filed. Moreover, delaying class certification would not solve all problems posed by the decrees since those putative members of the

class who are eligible to sign the waivers would probably have to be notified of the pendency of this suit (and their tentative status in it) before the waivers could be considered valid.

f. The Court should delay certification pending an adjudication of defendants' liability.

Defendant cites *Katz v. Carte Blanche Corp.*, 496 F. 2d 747 (3rd Cir. 1974) and *Nash v. Boeing Company*, 8 E. P. D. 9435 (E. D. Pa. 1974), as indicating a new trend of withholding class determination until after the individual plaintiff has prevailed on the merits. However both these cases involved certifications under 23(b)(3), and the factors which were central in the above decisions—particularly the consideration of the superiority of the class action method—are not relevant to a (b)(2) certification.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 73-1292.

MOSES DICKERSON, et al.

v.

UNITED STATES STEEL CORPORATION, et al.

ORDER.

AND Now, to wit, this 16th day of September, 1974, plaintiffs' amended motion for leave to add Curtis Worthy as plaintiff in the above captioned action is hereby DENIED.

Plaintiffs' motion to certify the below defined class as a proper class under Rule 23(a)(1-4) and 23(b)(2) of the Federal Rules of Civil Procedure is hereby GRANTED. The class in this action shall consist of:

a. all blacks now employed or who might be employed in the future by United States Steel Corporation at its Fairless Hills, Pennsylvania plant; all blacks who were employed by the company from July 2, 1965 to the present date, but who are no longer employed there; and all blacks who unsuccessfully sought employment at the Fairless Hills plant at any time between July 2, 1965 and the present date;

b. all blacks who are represented, or who might be represented in the future by defendant labor organizations at the Fairless Hills, Pennsylvania plant; and all blacks who were represented by defendant

labor organizations at the Fairless Hills plant from July 2, 1965 to the present date.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER, *J.*
Clarence C. Newcomer, *J.*